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# Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 115.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

*vs.*

ALEXANDER FLANNIGAN AND VIRGIL RULE.

**In Error to the St. Louis Court of Appeals of the State of Missouri.**

## STATEMENT.

In order to fully understand the issues raised by the pleadings in the case at bar, an historical review of the undisputed facts stated in the bill, as well as a reference to the record upon which they are based, is, we think, essential.

Tourville vs. Wabash, 61 Mo. Appeals, 527;
Same case, 148 Mo. 614;
Wabash vs. Tourville, 179 U. S. 322.

The defendant in error, Rule, is the assignee of Tourville, and is here claiming under him, and the allegations of the bill in equity here under consideration are all simply a repetition of the undisputed testimony found in the record above cited.

The case at bar, therefore, is but a continuation of the original litigation above referred to.

In 1887, Tourville, then in Illinois, executed a note for $100.00 to Flannigan, on account of legal services rendered by Flannigan, in that year, to Tourville, in that state.

In May, and part of June, 1891, Tourville worked for the Wabash Railroad Company, in North St. Louis, as a switchman, and then and there earned $81.98 as wages.

Tourville was then the head of a family, residing with them in Missouri.

The Wabash Company was then, as now, a consolidated corporation, organized in Ohio, under the laws of that state, out of five constituent companies, one each in the states of Ohio, Michigan, Indiana, Illinois, and Missouri.

These constituent companies all ceased to exist on the 1st day of August, 1889, after the organization of the Wabash Company in Ohio, as before stated.

Ashley vs. Ryan, 153 U. S. 436.

In May and June, 1891, the Ohio corporation, the Wabash Company, the plaintiff in error here, was operating a line of railway in the states of Ohio, Michigan, Indiana, Illinois, and Missouri, owning property in Illinois and Missouri, subject to execution, having agents in Illinois and Missouri, upon whom legal process could be served.

On the 3d day of June, 1891, Flannigan sued Tourville in Illinois; in attachment, on the note above described, and garnisheed the Wabash in that state.

Tourville, and his attorney, Rule, were duly notified by the Wabash, of the institution of the suit by Flannigan, in Illinois, and both Tourville and Rule refused to interpose any defense to it.

61 Mo. Appeals, 531.

The Wabash Company then tendered to Tourville, and to Rule, the amount of Tourville's exemptions in Illinois, then amounting to $50.00, the remainder to be held pending the then outstanding litigation in Illinois.

61 Mo. Appeals, 531.

In other words, Tourville and Rule, then, as now, insisted upon the Wabash Company paying Tourville's wages in Missouri, to that individual, said wages amounting to $81.98, and Tourville's undisputed debt to Flannigan in Illinois also, amounting to $100.00, out of the one fund in the hands of the Wabash Company, which amounted to precisely $81.98, and which never has exceeded said last named sum, exclusive of lawful interest thereon.

In 1891, the Wabash Company began a contest in the courts of Illinois, with Tourville's creditor, Flannigan, attacking the validity of his claim, pleading Tourville's exemptions, and also interposing the record of the Missouri proceedings hereinafter described, as a

bar. That contest did not end until nearly five years afterwards, or, in 1895, when all further defense was rendered unavailing, by a decision of the Supreme Court of Illinois, first rendered in 1892, in a test case, involving the same question.

Wabash R. R. vs. Dongan, 142 Ill. 248.

And in all that time, Tourville and Rule stood by and allowed the plaintiff in error here, a mere stakeholder, to make that fight for their benefit, without lifting a hand or spending a cent in their own behalf, and without interposing at any time any defense whatever to Flannigan's claim.

On June 10, 1891, Tourville left the service of the Wabash, and on that day instituted a suit against it before a justice of the peace in Missouri, for the full amount of his wages ($81.98). He obtained a judgment by default before the justice. The Wabash Company thereupon perfected an appeal in the case to the Circuit Court of the City of St. Louis, Missouri.

In the meantime, the Flannigan case had proceeded to final judgment in the appellate court in Illinois, where, in 1892, the sum of $21.83 on the judgment, or $71.83 less $50.00 exemption, and $21.55 costs, in all $43.38 was collected of the Wabash Company on execution.

This judgment in accordance with the practice then prevailing in Illinois, was in the following form: Peter Tourville to the use of Alexander Flannigan, plaintiff, vs. Wabash Railroad Company, garnishee.

In the same year, after the collection of the Flannigan judgment above described, the Tourville case came on for trial *de novo* in the Circuit Court of the City of St. Louis, Missouri.

There, upon proof of payment of the sum of $43.38 on the Flannigan judgment in Illinois, the Circuit Court of St. Louis, Missouri, entered the following judgment:

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|---|---|
| Amount due Tourville as wages, - - | $81.98 |
| Less judgment and costs paid on execution in Flannigan case in Illinois, - - | 43.38 |
| Balance due, for which judgment was rendered, | 38.60 |

Tourville perfected an appeal from this ruling to the St. Louis Court of Appeals, where, on March 26, 1895, the judgment below was reversed with directions to the lower court to enter up a judgment for plaintiff for $81.00.

61 Mo. Appeals, 527.

The reason assigned for this ruling in the appellate court was that the justice had failed to mail to Tourville in Missouri, prior to the trial, a notice of the proceedings as required by the statute of

Illinois, although it was admitted at the trial that long prior to the judgment in Illinois and in ample time to have interposed a defense thereto, both Tourville and his attorney, Rule, had each been personally notified by the Wabash Company of the pendency of the Illinois proceeding, and that both Tourville and Rule had then and there refused to defend against the Illinois suit instituted by Flannigan as aforesaid.

On the 1st day of April, 1895, before the mandate above described reached the circuit court in Missouri, Flannigan instituted a second suit in Illinois to recover the balance due him from Tourville on the note above described, and again garnisheed the Wabash Company in Illinois.

This last named case was pending and undetermined in Illinois in May, 1895, when the mandate above described reached the circuit court in the Tourville case in Missouri.

In the circuit court in Missouri, in May, 1895, at the second trial of the case, the Wabash Company offered to prove by competent evidence the pendency of the second Illinois proceeding.

The court excluded the testimony and entered judgment in favor of Tourville for $81.00. Subsequently, and as late as December 4, 1895, in the Missouri proceeding, the Wabash Company offered to prove that on the 15th day of May, 1895, Flannigan obtained a judgment against Tourville in Illinois for $139.30, a judgment which neither Tourville nor Rule ever either defended against, or disputed, on the note above described, and also a judgment against the Wabash Company, as garnishee, for $81.98, the whole amount of the wages due to Tourville from the Wabash Company, after the same unavailing defenses, as above stated, had again been interposed by the Wabash Company to Flannigan's second suit in Illinois.

The Wabash Company then perfected an appeal in the Missouri case at law, to the Supreme Court of Missouri, where, on October 14, 1899, the judgment of the Circuit Court of the City of St. Louis, Missouri, was affirmed.

Tourville vs. Wabash, 148 Mo. 614.

The decision in this case was based on the sole ground that the two judgments above described—the one in favor of Tourville to the use of Flannigan as aforesaid, against the Wabash in Illinois, and the one in favor of Tourville against the Wabash in Missouri—were in different states, and therefore "foreign to each other."

The Wabash Company then perfected an appeal in the Tourville case to this court, where, on the 3d day of December, 1900, the judgment of the Supreme Court of Missouri was affirmed.

Wabash vs. Tourville, 179 U. S. 322.

The affirmance of this judgment at law in this court was based upon the same reason given by the Supreme Court of Missouri. From this judgment in this court Mr. Justice Brewer dissented.

On the 17th day of December, 1900, immediately after the expiration of the period authorized by the rules of this court for filing motions of rehearing (Rule 30, Supreme Court of the United States, Foster's Federal Practice, Vol. II, p 1433), the Wabash Company filed a bill of interpleader in the Circuit Court of the City of St. Louis, Missouri.

The object of this bill, which was an equitable proceeding, was an honest endeavor, made in good faith, by the Wabash Company, to get the rival claimants to this one fund into the same jurisdiction, if possible, so as to avoid paying the same debt twice. The original bill of interpleader will be found on pages 11 and 12 of the record in this case. Personal service was had upon this bill upon Rule, the assignee of Tourville, who, on the 22d day of December, 1900, filed a demurrer to the bill, stating two grounds: first, that the court had no jurisdiction over Flannigan; and, second, that the judgment in favor of Tourville had been assigned to Rule, and that such judgment had priority over the Flannigan judgment in Illinois, and that such priority in favor of Rule as assignee had been determined in his favor by the St. Louis Court of Appeals, the Supreme Court of the State of Missouri, and the Supreme Court of the United States. (Record, p. 13.)

On the 5th day of February, 1901, Flannigan entered his voluntary appearance in the cause, and on the same day filed an answer admitting each and every allegation in the bill, and claiming priority to the fund in dispute under the Illinois judgment. (Record, p. 14.)

On the 20th day of February, 1901, the Wabash Company filed an amended bill. (Record, pp. 14 to 16, inclusive.)

On the 26th day of February, 1901, the second amended bill above described was stricken out on the motion of the defendant Rule. On the 15th day of April, 1901, the plaintiff was granted leave to file its third amended bill, over the objections of the defendant Rule. (Record, pp. 16 and 17.)

On the 15th day of April, 1901, a temporary injunction was granted in the cause.

On the same day the sheriff filed his return, in which it was recited that he had levied upon defendant's property, pursuant to an execution duly issued upon the Tourville judgment in Missouri.

On the 19th day of April, 1901, Rule filed a return to the third amended petition of plaintiff, setting up *in extenso* the same grounds of objections already stated in his demurrer to the original bill. (Record, pp. 18 to 20, inclusive.)

On the 22d day of April, 1901, Flannigan filed an answer to the third amended petition, again admitting every allegation in the

bill, and again claiming the fund in dispute under his Illinois judgment.

On the 22d day of April, 1901, plaintiff filed its motion for the relief prayed for, notwithstanding the return of Rule. (Record, p. 21.)

On the 29th day of April, 1901, the trial court entered the following order: "Prayer of bill denied, and temporary injunction dissolved." (Record, p. 22.)

To which ruling of the court the plaintiff (Wabash Company) then and there duly excepted and saved its exceptions. (Record, p. 23.)

On the 30th day of April, 1901, in due time, the Wabash Company filed its motion for rehearing in said case, assigning as error, among other things, the following: "14. Because the effect of the court's ruling in this cause will be to compel the plaintiff, the interpleader herein, to pay Tourville's wages and his debts too; or, in other words, pay the same debt twice. 15. Because the court erred in refusing to give full faith and credit to the judgment of a sister state, as required by the constitution and laws of the United States." (Record, p. 24.)

On the 7th day of May, 1901, plaintiff's said motion for rehearing was overruled, to which ruling, order and action of the court, plaintiff then and there duly excepted and saved its exceptions. (Record, p. 24.)

Thereafter, in due time, plaintiff perfected its appeal to the St. Louis Court of Appeals. (Record, p. 24.)

On the 30th day of July, 1901, in due time, plaintiff filed its bill of exceptions in said cause. (Record, p. 25.)

At the March term, 1902, the judgment of the Circuit Court of the City of St. Louis was affirmed in the St. Louis Court of Appeals. (Record, pp. 36 to 41.)

On the 12th day of June, 1902, the plaintiff in error, the Wabash Company, filed a petition for a writ of error with the presiding judge of the St. Louis Court of Appeals. (Record, pp. 41 and 42.)

On the same day said writ of error was denied. (Record, p. 42.)

The plaintiff in error, Wabash Company, thereafter presented the same petition to Mr. Justice Brewer. (Record, pp. 43 to 46.)

On the 21st day of July, 1902, the following entry was made, "Let writ of error issue as prayed for. David J. Brewer, Associate Justice Supreme Court of United States." (Record, p. 47.)

The writ was duly served upon the defendants, Rule and Flannigan. (Record, p. 48.)

During all of this litigation, however, the relative positions of the respective claimants to the fund herein in controversy have not changed in the slightest degree, as Flannigan, during the litigation

in Missouri between Tourville and Rule and the Wabash, in which he was also interested, retained his judgment in Illinois, whose lien was unimpaired, and whose security was undiminished, and upon which interest is still uninterruptedly accumulating, while Tourville and Rule were then, always have been, and still are, in exactly the same condition as to their judgment in Missouri.

There never was a hearing of this cause given to either Flannigan or Rule, and the question of priority, as between these respective claimants to the fund, which is, it is conceded, amounts to $81.98, and no more, in the hands of the plaintiff in error, the Wabash Company, has never as yet been determined.

In fact, the Circuit Court of the City of St. Louis, Missouri, by denying the relief prayed for in the bill, and by dissolving the temporary injunction, refused to either entertain the bill, grant the relief prayed for, or hear or determine the respective priorities between the rival claimants to the fund above described,

The following issues are, therefore, we think, fully and fairly presented in this record:

*First.*—Whether a court of equity in Missouri can violate or ignore the provisions of section 1 of article 4 of the constitution of the United States by, in effect, refusing to give full faith and credit to judicial proceedings of the state of Illinois.

*Second.*—Whether a court of equity in Missouri can deny to a stakeholder, or to other claimant of the fund in the stakeholder's hands, a hearing upon a proper bill of interpleader, when such claimants of the fund in dispute are citizens of different states, and all parties have appeared, and are in court, before the chancellor.

*Third.*—Whether, under such circumstances, a dismissal of such a bill of interpleader, without a hearing, is not a denial to the respective claimants, and also to the stakeholder as well, of a "title, right, privilege or immunity, claimed by the parties under the laws of the United States."

*Fourth.*—Whether a court of equity has ample and perfect jurisdiction over such a bill of interpleader, as well after the respective and adverse claims to the fund have been reduced to judgment as before, so as to protect an innocent stakeholder who comes into court with clean hands, as in this case, from paying the same debt twice.

*Fifth.*—Whether the plaintiff in error in this case, after having contested the validity of both claims to the fund in dispute, but not their priority, in the courts of last resort in the states of Illinois and Missouri, has been guilty of laches at any time since the inception of this controversy.

These issues will here be discussed in the order above stated.

## BRIEF.

### I.

*This court has ample jurisdiction, to hear and determine this controversy, by reason of the constitutional question apparent upon the face of the record.*

The bill of interpleader in the case at bar alleges that two judgment creditors, whose respective claims have been fully and finally determined at law, in the courts of last resort, in the states of Illinois and Missouri, are each claiming priority to a certain fund in the plaintiff's hands, and are proceeding to collect the same from the plaintiff by execution.

That the fund in hand is insufficient to pay both claims, as each judgment is for the entire amount in the plaintiff's hands. That plaintiff does not know, and cannot determine the priorities, between these claimants, and is in danger of being compelled to pay the same debt twice.

The prayer of the bill is that the fund may be deposited in court, the claimants to the fund be required to interplead for it, and the plaintiff to be discharged thereafter with its costs.

The two claimants were brought in, one by appearance, and the other by valid process.

One, the Illinois claimant, filed an answer, admitting all the allegations of the bill, and claiming priority for his judgment. The other, the Missouri claimant, demurred to the bill, and also claimed priority for his judgment.

There never was any hearing of the cause.

In lieu of that, the bill was dismissed.

The plaintiff in error, then specifically assigned as error, among others:

"Because the court erred in refusing to give full faith and credit to the judgment of a sister state, as required by the constitution and laws of the United States." (Record, p. 24.)

Upon this showing, we submit, this court has jurisdiction to hear and determine this controversy, because it appears from the record that a constitutional question was not only raised, but necessarily passed upon as well, in the trial court.

And this is true, although the trial court did not, in terms, pass upon the point.

It is sufficient if it appear from the record by clear intendment.

In support of the above proposition, we beg leave to cite the following decisions of this court:

Ins. Co. vs. Needles, 113 U. S. 574;
Carpenter vs. Strange, 141 U. S. 87;

Water Co. vs. Green Bay, 142 U. S. 269;
Gordon vs. Bank, 144 U. S. 97;
Cooke vs. Avery, 147 U. S. 375;
Powell vs. Brunswick County, 150 U. S. 440;
Scott vs. McNeal, 154 U. S. 34;
Sayward vs. Denny, 158 U. S. 180;
Ry. vs. Chicago, 166 U. S. 226;
Canal Co. vs. Paper Co., 172 U. S. 58;
Water Power Co. vs. Ry. Co., 172 U. S. 475;
Ry. vs. Sturm, 174 U. S. 710.

It may be contended that the decision of the court below in no way affected the integrity of the Illinois judgment.

That judgment remains today, as it existed before the suit was instituted, a valid, final judgment. That fact stands admitted in this record.

The allegations to that effect in the bill, are admitted by the answer of Flannigan, and by the demurrer of Rule.

This situation, instead of mitigating against our contention, is, in fact, its foundation.

There are two well-recognized instances wherein the judgment of a sister state may become a federal question:

*First.*—Where the existence, or validity of such judgment is in dispute in a state court, and the decision impairs its integrity, or existence.

*Second.*—Where the effect of the judgment according to the law and usage of the state where rendered is in dispute in a state court, and the decision is adverse "to the claimed or contended effect of such judgment."

The case at bar falls under the latter instance.

The following decisions of this court are illustrations of this principle:

Crapo vs. Kelley, 88 U. S. 610;
Dupasser vs. Rochersar, 21 Wallace 130;
Live Stock Company vs. Butchers Union, 120 U. S. 141;
Carpenter vs. Strange, 141 U. S. 87;
Huntington vs. Attrill, 146 U. S. 657;
Ry. vs. Sturm, 174 U. S. 710.

It is clearly deducible, we think, from the above cases that when a suit in a state court involves in any manner a judgment of a sister state, and one of the parties to the suit sets up or claims that such judgment, under the law and usage of the state where rendered, gives him certain rights, or entitles him to certain remedies, and the state court denies such claim, a federal question is presented of which this court will take jurisdiction by writ of error.

As said in Green vs. Van Buskirk, 5 Wallace 310, that the claimed effect of the judgment may not be sustained by this court on final hearing. It is the claim or contention alone which gives rise to the federal question.

The phrase "claimed or set up," "effect of the judgment" as used in the above decisions, does not mean that the pleadings shall specify in detail or specially the effect of the judgment under the laws of the state where rendered. It seems simply that if the remedy prayed in the petition as the result of the judgment is denied, the federal question arises. The relief prayed for constitutes the claim as to the effect of the judgment. In the case of Huntington vs. Attrill *et al.*, *supra*, the petition simply recited the recovery of the judgment, and the execution of the fraudulent conveyances, and then prayed that the conveyances be set aside and the property subjected to the payment of the judgment. The prayer of the petition for the relief by implication "set up and claimed" that the judgment entitled the plaintiff to the relief demanded. The bill was dismissed and this court held that a federal question was thereby presented.

The case of Crapo vs. Kelley, *supra*, was in the nature of an action of replevin, wherein the only issue presented by the pleadings was the right to the property in controversy. The denial by the state court of the plaintiff's claim to the property, this court decided, presented a federal question.

In the case at bar the interpleader filed its bill setting forth the two judgments, and prayed that it be permitted to pay the money into court, and that it be discharged from all liability to the defendants, and that the defendants be required to interplead. This prayer, as in the cases cited, asserted a right to a remedy by virtue of the foreign judgment, and the denial of this claim by the state court presented a federal question.

It is to be borne in mind that in the case at bar the holder of the Illinois judgment acquiesced in the prayer of the bill and set up his claim to the money, while the holder of the Missouri judgment denied the right of the interpleader to require him to enter into a contest with the Illinois creditor for the money. So the question presented was whether the effect of the Illinois judgment was such as to entitle the interpleader to be discharged by paying the money in court, and then require the Missouri creditor and the Illinois creditor to submit their respective claims to the money to the decision of the court. If the interpleader's bill means anything, it certainly means that the interpleader based its right to pay the money into court and thenceforth be discharged, and to require the Missouri creditor to interplead on the effect of the Illinois judgment. If this be true it necessarily follows that the state court denied the Illinois judgment, the effect the interpleader claimed for it, which denial presents a federal question.

According to all the cases, the fact that the Missouri court did not discuss in its opinion the federal question but decided the case on other grounds, is of no consequence. The question is, did the state court, by its judgment, necessarily deny to the Illinois judgment the effect claimed for it by the interpleader? If it did, it is wholly unimportant what reasons it assigned in its opinion for so doing.

In conclusion on this point, we respectfully insist that a federal question is clearly presented in this record, and that interpleader is entitled to the writ.

## II.

*By denying the relief prayed for, the court below deprived the plaintiff in error of its property "without due process of law," in violation of the 14th amendment to the constitution of the United States.*

This point was not specifically assigned, but it does appear by clear intendment upon the face of the record, and was in fact directly ruled upon against the plaintiff in error in the trial court. (Record, pp. 4, 5, 23, 27.)

This is apparent, when the situation disclosed by the record is re-examined, for this purpose. The admitted facts there found, are as follows:

1. Flannigan was the holder of a judgment against Tourville, and the plaintiff in error, based upon an unpaid and undisputed debt, due him from Tourville, obtained by Flannigan in the courts of Illinois.

The validity of that judgment had been finally established in the courts of last resort in that state.

2. Rule, the assignee of Tourville, was the holder of a judgment against plaintiff in error, whose validity had been established by the courts of last resort in Missouri.

3. Both judgments were for the entire amount of the fund in the hands of plaintiff in error, the sum of $81.98. So that the plaintiff in error, a mere stakeholder, if no relief in equity was afforded to it, would be compelled at law, to pay the same debt twice.

This precise allegation appears, in apt terms, in the bill.

4. The priority of either judgment, over the other, in different states, thus "foreign to each other," had never been established, in any court, either of law, or equity, anywhere.

This priority, the plaintiff in error, a mere stakeholder, was wholly unable to determine.

This precise allegation also appeared in the bill.

5. The plaintiff in error, it was admitted, was an innocent and disinterested stakeholder.

Now to deny, as the court below did, to such a stakeholder, the right to deposit the money in court, so that the priorities of the rival claimants might be determined, and the unsuccessful claimant whoever it might be, precluded from further recovery against the stakeholder, was, we insist, in effect, to compel the stakeholder to pay both claims, or the same debt twice, and thus deprive it of its "property without due process of law," in violation of the spirit, as well as the letter of the constitution of the United States.

This point expressly appears so clearly in this record, as to require, we think, no further discussion, or elaboration, in its support.

It seems to us, to be settled in our favor, by this court, in the recent case of Ry. vs. Sturm, 174 U. S. 710.

## III.

*The plaintiff in error was entitled to the relief prayed for by it, and Flannigan was entitled to a hearing on the issue of priority tendered by him.*

Again referring to the bill of interpleader (Record, pp. 3, 4, 5), it was there expressly alleged, as before stated, that the plaintiff in error was unable to determine the priorities between Flannigan, the Illinois judgment creditor, and Rule, the assignee of Tourville, the Missouri judgment creditor, who were both seeking to sequester the same fund in the hands of plaintiff in error.

Flannigan, the holder of the Illinois judgment, voluntarily entered his appearance to the bill, filed an answer thereto (Record, p. 20), in which all the allegations of the bill were admitted, and, by the same pleading, the fund in dispute was claimed by him by reason of the alleged priority of his Illinois judgment.

Rule, who was served with valid process, at the place of his domicile, a forum where he appeared with the least trouble, or expense, filed a return, which was, in effect, a demurrer to the bill, in which all the facts therein alleged were admitted, and in which he also claimed the fund in dispute, by reason of the alleged priority of his Missouri judgment.

The difference, in position, between these two rival claimants, was therefore this:

Flannigan was willing to submit the question of priority between the two judgments for the same fund in different states to the decision of the chancellor upon a hearing, and therefore, he tendered that issue, and claimed that right in his answer.

Rule, on the contrary, while claiming priority for himself, under the Tourville judgment in Missouri, challenged the right of the chancellor to hear, or determine the question of priority, as between himself and Flannigan.

As between the two, in this record, it is quite clear that Flanni-

gan came into a court of equity with "clean hands," while Rule did not.

The chancellor adopted Rule's view of the matter, and so did the appellate court, which resulted in a dismissal of the bill, thus denying to the plaintiff in error, a right claimed by it under the constitution and laws of the United States, to have the question of priority, then and there in issue, between these claimants to the same fund who were thus "foreign to each other," determined; and denying also to Flannigan, a citizen of Illinois, the right to a hearing on an issue properly tendered by him in his answer to this bill, as to whether his judgment obtained in Illinois, was prior in right to that of the judgment held by Rule, the assignee of Tourville, obtained in Missouri, a right to which Flannigan was clearly entitled, under the constitution and laws of the United States.

Here, we submit, is another firm basis for the jurisdiction of this court over this controversy.

The plaintiff in error is entitled to the relief prayed for in order to protect it from the payment of the same debt twice, while Flannigan is equally entitled to a hearing on the question of priority upon the plainest and soundest principles of equity jurisprudence.

IV.

*A bill of interpleader may be properly filed in any cause, as well after the adverse claims to the fund have been reduced to judgment, as prior to that time.*

Upon this point the learned justices of the St. Louis Court of Appeals, in their opinion in this case, said:

"But that such a court has jurisdiction of a bill for an interpleader filed by the judgment debtor, to require two judgment plaintiffs to come into court and interplead for the purpose of ascertaining which one of the two judgments at law against the common debtor shall be paid and which shall not be, is an unheard-of proposition, without the semblance of reason or authority to support it."

In support of the text, the following authorities are cited:

Cheever vs. Hodgson, 9 Mo. App. 565;
Dodds vs. Gregory, 51 Miss. 351;
Woodruff vs. Taylor, 20 Vt. 65;

To which can fairly be added,

Provident Savings Inst'n vs. White, 115 Mass. 112.

In Cheever's case, *supra*, the priorities between the respective claimants to the fund in dispute, had all been fixed and determined at law, prior to the filing of the bill of interpleader.

In this case such priorities have not only never been determined, but the court below, with both claimants before it, and all the facts admitted, refused to pass upon that question, and dismissed the bill in which that precise issue was tendered.

The distinction between the two cases is too obvious to require further discussion.

The same distinction will be found, upon examination, to exist between this case and Dodds vs. Gregory *et al.*, 61 Miss. 351. The last named decision is also based in part, upon a statute peculiar to Mississippi, relative to interpleader, which, of course, could not be invoked here.

In Woodruff vs. Taylor, 20 Vt. 65, the priority of one claimant (the American) was manifest.

There, also, the contest was at law, and no resort was ever had to a court of equity, in order that the question of priority between the claimants might be fixed and determined.

In Savings Inst'n vs. White, 115 Mass. 112, it was properly held, we think, that a bill of interpleader, filed by a claimant of the fund, and not a stakeholder, would not lie.

Here it is admitted that the plaintiff in error was not in collusion with or interested in either claim to the fund in dispute.

The authorities above cited, therefore, do not support the text of the opinion above quoted.

On the other hand, there is abundant authority for the proposition that bills of interpleader may be filed after the adverse claims have been reduced to judgment.

Mr. Justice Story in his great work on equity jurisprudence thus states the rule for which we here contend:

"But a bill of interpleader may be filed after a verdict at law, if the effect of the action was merely to ascertain the damages due the plaintiff at law, who was a defendant in the equity case."

> Story, Equity Jurisprudence, 13th Edn., Vol. 2, (note) p. 137.

In Hamilton vs. Marks, 5 De Gex & Smale 638 (13 Eng. Law and Equity Reports, 321), a bill of interpleader in equity was filed after one of the numerous claimants to the fund had obtained a judgment at law against the insurance company who filed the bill.

Upon that point (p. 324), the vice-chancellor said:

"Upon this motion the court can decide nothing as to the title of the absent defendants. As to the $700, the circumstances clearly raise a case of interpleader; the plaintiff having paid the money into court, and having made an affidavit that there is no collusion, has entitled himself to the injunction he has obtained.

But it is said that the plaintiff cannot file a bill after the demand has been contested by him, and has been decided against him at law.

The case of Cornish vs. Tanner has been referred to in support of such a rule; but the present case differs from that. Here the dispute at law was confined to the *quantum* of demand, which could be settled at law; and there is no rule of this court to preclude a defendant at law who has done that from obtaining relief in an interpleader suit."

There, as here, the amount of the conflicting claims against the interpleader had been fixed by a court of law; and had been there reduced to judgment.

There, as here, a stakeholder having no interest in the controversy, and unable to settle the question of priority between the conflicting claims, filed a bill of interpleader in equity in order that such an issue could be there determined and the stakeholder protected from paying the same debt twice. And it was there held by the chancery court of England, not only that the bill would lie, but, also, that the stakeholder was, under such circumstances, after paying the fund in dispute into court, the exact prayer of the bill in the case at bar, entitled to its costs and also to its discharge.

The principle there announced is, we insist, decisive of the case at bar.

In Johnson vs. Maxey, 43 Alabama 521, the stakeholder, after a judgment at law against it in a condemnation proceeding, brought the money into court in order that it might be there determined whether the judgment should be paid to the judgment creditor or a rival claimant, who asserted title to the land in dispute, and it was there held to be a proper action.

There, as in the English case above cited, as well as in the case at bar, the question of priority between adverse claims to the fund, the *quantum* of which had been fixed and determined by a judgment at law, was the issue tendered by the stakeholder through a bill of interpleader, in a court of equity, and there, as here, it was necessary to so determine that issue in order to protect the disinterested and innocent stakeholder from paying the same debt twice.

And for that reason it was there held that a bill of interpleader would lie.

In Newhall vs. Kastens, 70 Ills. 156, it was held that the owner of premises could maintain a bill of interpleader as against adverse claimants to a fund in his hands, even where such claimants had secured statutory liens by suits, for labor performed and materials furnished for improvements on such owner's land.

In Mills vs. Townsend, 109 Mass. 115, in holding that a corporation could maintain a bill of interpleader, the court said:

"They have no beneficial interest in the dividend; each of the defendants claim it; and the plaintiffs cannot determine, without hazard to themselves, to which of the defendants it belongs. This is sufficient to maintain a bill of interpleader, although the plaint-

iffs may have interests in other questions not relating to the specific fund."

The true basis for a bill of interpleader is thus correctly stated by the St. Louis Court of Appeals in Robards vs. Clayton, 49 Mo. Appeals, 610, 611:

"We have no statutory provisions governing the proceedings in equity upon a bill of interpleader, and hence are remitted to the rules of chancery courts to determine whether this bill is subject to general demurrer as not stating a cause of action. A bill of interpleader is ordinarily exhibited where two or more persons claim the same debt or duty, or other thing, from the plaintiff, by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty or other thing, fears that he may suffer injury from their conflicting claims, and, therefore, he prays that they may be compelled to interplead and state their several claims, so that the court may adjudge to whom the same debt, duty or other thing belongs."

In Building Association vs. Joy, 56 Mo. Appeals, 433, there were two judgments at law, in courts of different jurisdiction, against the same property, in one of which the interpleader was a party defendant.

There were not only as above stated, two judgments at law, in different courts, on these conflicting claims, and one of these judgments rendered against the interpleader, but also an execution, a levy, and an advertisement of the property, which was the fund in dispute, for sale, by one of the claimants.

The Building Association, although it was judgment debtor, was also, as the plaintiff in error is, in the case at bar, an innocent and disinterested stakeholder.

The Building Association could not determine the question of priority between these conflicting claims, and was in danger of being compelled to pay the same debt twice.

The St. Louis Court of Appeals, in that case said:

"The respondent (the Building Association) thus placed between two fires, could not with safety pay the money to either party; no other course was open to it except the one pursued."

That course was a bill of interpleader filed by the Building Association, who was permitted to pay the fund into court.

The rival claimants were then directed to interplead, and the Building Association discharged.

From that ruling one of the claimants, Joy, appealed to the St. Louis Court of Appeals.

There, the ruling below was sustained.

So it is here;

The plaintiff in error here could not, and cannot, determine whether the Tourville judgment in Missouri, has priority over the Flannigan judgment in Illinois, or, *vice versa*.

No court has, as yet, passed upon that question. The opportunity to so determine that issue was never given to any court until this bill was filed.

The Circuit Court of the City of St. Louis, Missouri, can alone determine that question, because, for the first and only time during this entire litigation, the rival claimants to the fund in dispute have appeared together in that court.

If the plaintiff in error here is precluded from maintaining this bill because of the fact that the adverse claims to the fund in dispute have been reduced to judgment, in different jurisdictions, "foreign to each other," then, and for exactly the same reason, the Insurance Company was also precluded in the English case above cited, the Railway Company in the Alabama case cited, and the Building Association also, in the Missouri case determined in the St. Louis Court of Appeals.

The admitted facts stated in this bill are that there is but one fund sought to be reached by the two judgment claimants, each of whose judgments was obtained upon the theory that the respective plaintiff therein was entitled to the entire fund.

Immediately after the affirmance of the judgment in Missouri, the plaintiff in error, the holder of the fund in dispute, brought it into court by a bill of interpleader.

The plaintiff in the Illinois judgment (Flannigan) appeared to this bill, brought his judgment into court, submitted it to the jurisdiction of the court, and asked a determination of its priority over the judgment which had been obtained by Rule, assignee, in Missouri, who had been brought into court by valid process. The case then stood upon the bill of interpleader; the full and complete answer of the plaintiff in the Illinois judgment; and the return embodying the objections of Rule, the assignee of the Missouri judgment, which, in substance, seems to have been the claim that "the bill does not state facts sufficient to constitute a cause of action for the equitable relief prayed for therein." The party making this objection was validly in court by process.

The owner of the other judgment obtained in Illinois against the same fund, was validly in court by appearance duly entered, and by submission of the validity and priority of his judgment, in his answer to the bill of interpleader.

Upon this state of the pleadings and record the common debtor was clearly entitled to a judgment of the court of equity as to which of the two judgments should be satisfied by the application of the single fund.

The plaintiff in the bill of interpleader had the absolute right to a decree of the court ascertaining and defining the right of the plaintiff in the Illinois judgment as to the common fund; for that was the very question submitted to its jurisdiction by Flannigan, the Illinois judgment creditor, in his answer to the bill of inter-

pleader, and an adverse judgment upon that issue would have been pleadable against him in subsequent proceeding, and would have been a full protection to the plaintiff in the bill of interpleader for a subsequent payment of the judgment in favor of Rule, assignee.

For aught that appears in this record, the trial court might have rendered such a decree if it had proceeded (as it should have done) to a determination of the issues presented by the answer of the owner of the Illinois judgment.

Instead of doing this, the learned circuit judge seems to have reached the conclusion that he had no jurisdiction to grant the plaintiff in the bill of interpleader this relief, although the party against whom it might have been obtained was regularly before the court by appearance duly entered, answer filed, submitting the very question of his right to enforce his respective judgment against the common fund in the hands of the plaintiff in the bill of interpleader.

It is respectfully submitted that the learned chancellor below manifestly erred in not passing upon the question of the right of the plaintiff in error to relief against the Flannigan judgment.

Nor was Rule, the assignee of the Missouri judgment, in a position to complain of the act of the holder of the Illinois judgment, in voluntarily submitting the question of his rights thereunder to the decision of the courts of Missouri. If the Missouri judgment is entitled to priority of payment out of the common fund, the owner thereof could not be prejudiced by the act of the owner of the Illinois judgment in bringing it before the court and asking a determination of his rights thereunder. In any event, the plaintiff in the bill of interpleader was entitled to the protection of a decision in the court below against the enforceability of the Illinois judgment, in case the court below should decide that it could not be enforced against the common fund, because a valid judgment against that fund had been rendered by the courts of Missouri.

We respectfully submit that the summary action of the learned trial judge in disposing of this case without a trial of the issues validly joined therein, is without the support of precedent or reason. For even if the learned trial judge had taken the view that the Missouri judgment was impregnable to attack, he should have proceeded to adjudge the invalidity of the Illinois judgment, since that very question was validly submitted to him by the answer of its owner. This was a mere measure of justice to which the plaintiff in error was clearly entitled.

We, therefore, respectfully submit that upon principle as well as authority, the case should have proceeded to a hearing in the court below, instead of a dismissal of the bill as here complained of.

V.

*The plaintiff in error has never been guilty of laches throughout this entire controversy.*

It is intimated in the opinion of the learned appellate court, in the case at bar, that plaintiff in error here has been guilty of laches, in equity, or is subject to the application of the doctrine of *estoppel in pais*, because of the length of time in which this controversy has been pending in the courts of law in Illinois and Missouri.

But this view is erroneous, we think, for the following reasons:

*First.*—Because the defense of laches was not interposed by either of the defendants in this case, by answer, and, therefore, it cannot be either interposed or relied upon, for the first time, in an appellate court, by either of them.

*Second.*—Because the rights of the contending parties have not been impaired, their security diminished, nor their relative positions changed, during the pendency of this litigation.

*Third.*—Because the efforts of the plaintiff in error to escape the payment of the same debt twice, at law, do not amount, in equity, to laches.

1.

*The Equity Rule.*

The appellate court has, properly, we think, held that the allegations in the bill of interpleader here under review are to be taken *pro confesso*, by reason of the answer filed by Flannigan and the demurrer of Rule.

In this position the court is supported by both reason and authority.

Daniell's Chancery Practice (5th Edn.), Vol. 1, pp. 544, 850,

Story, Equity Jurisprudence (13th Edn.), Vol. 2, p. 1529.

*The Rule Under the Missouri Code.*

The Missouri Code of Practice has abolished all distinctions between the forms of legal and equitable defenses, and expressly provides that all defenses not specially pleaded are waived.

Rev. Stat. Mo. 1899, Vol. 1, Sec. 602, p. 253.

"Laches is an equitable defense, and there is no artificial, fixed or determinate rule on this subject, but each case as it arises must be decided according to its own particular circumstances."

Landrum vs. Bank, 63 Mo. 56.

"In the first place, there was no such point made in the answer, and nothing is better settled as a rule of pleading than that an *estoppel in pais* must be pleaded in order that advantage may be taken of it on trial of the issues.

Not only must the estoppel be pleaded, but this must be done with more certainty than is requisite or will suffice in ordinary defenses.

* * * * * * *

Nor does it matter that this is an equity case instead of one triable at law, since, in either case, no defense will be considered but which is embraced within the issues raised by the pleadings."

Bank vs. Doran, 109 Mo. 51-2.

*And see, also, the Illinois rule:*

Ziegler vs. Hughes, 55 Ill. 288;
O'Halloran vs. Fitzgerald, 71 Ill. 53.

Both Rule and Flannigan, therefore, have waived that defense, if it ever existed in this proceeding, by neither alleging nor proving it.

2.

Can laches be inferred from the mere fact that this controversy has been pending in a court of law, on the issue only as to the validity of these rival claims, but not their priority, for several years, without impairing the rights of said claimants in the slightest degree, and without altering their status in any particular?

This question has been twice answered in the negative by this court.

Endminger vs. Powers, 108 U. S. 292;
R. R. vs. Ry., 111 U. S. 520.

And, the same rule has been thus stated by the Supreme Court of Missouri:

"Mere delay or lapse of time, however, short of the statutory period, is not of itself, sufficient to constitute laches. *It must further appear that the other party has been injured by the delay.*"

Spurlock vs. Sproule, 72 Mo. 503;
Pike vs. Martindale, 91 Mo. 285;
Lindell vs. Lindell, 142 Mo. 79;
Wenderly vs. Lafayette Co., 150 Mo. 635.

It is amply supported by authority elsewhere.

12 Am. and Eng. Enc. Law, p. 544, and cases cited;
Nudd vs. Powers, 136 Mass. 273;
Gamble vs. Folsom, 49 Mich. 141;
Platt vs. Platt, 58 N. Y. 646.

And so here, the length of time in which both the Flannigan and the Tourville cases were pending, on appeal, in Illinois and Missouri, is of no consequence, and does not bar the plaintiff in error, in this proceeding, because, each of the claimants of this fund, Flannigan and Tourville, were severally, and vitally interested in the entire litigation, in both states, as well as in each of them, from the beginning to the end of it, and their respective interests were not affected, nor their status changed to their prejudice, in any way, during that whole period.

3.

Upon no equitable theory can it be held, in this proceeding, that the contest over the validity and *quantum* of the respective claims of Flannigan, and Tourville, at law, in separate states, and in foreign jurisdictions, precluded the plaintiff in error here, at the close of such contests of law, from filing this bill of interpleader, in equity, in order that *the priority of the two claims to the one fund might be determined.*

The litigation in the courts of law, in Illinois, and Missouri, was forced upon the plaintiff in error by Flannigan, and Tourville.

The plaintiff in error was, as this record shows, never idle during the entire period.

It never slept upon its rights, and there never was a moment from 1891 to 1900, when the plaintiff in error was not actively engaged, a part of the time simultaneously in both states, in defending itself against both of these rival claimants to the one fund in its hands.

And, in all of that time, as the record shows, the sole purpose of plaintiff in error, in thus attempting to interpose at law the pendency of the Missouri proceeding in the Illinois case, and the pendency of the Illinois proceeding in the Missouri case, was simply in order to avoid the payment of the same debt twice.

Again, the defense against the Flannigan case, by plaintiff in error, in Illinois, was made, as the record shows, in the interest of Tourville, as well as for itself.

And its defense in Missouri, of the Tourville case, was made also in the interest of Flannigan as well as for itself.

Flannigan and Tourville could both wait, as they did, until the cases at law were determined in their respective states, before appearing in the same jurisdiction, and each claiming the fund in a court of equity. Afterwards both claimants appeared before the chancellor, the one voluntarily, and the other after due service upon him of valid process, and both claimed priority to the same fund (one fund only), in the hands of plaintiff in error.

Flannigan, the Illinois creditor, is thus seeking to collect an undisputed debt, long due to him from Tourville, in that state, re-

gardless of the fact that plaintiff in error is in danger of being compelled to pay the same debt twice, once to Flannigan, and again to Rule, the assignee of Tourville.

Rule, the assignee of Tourville, is here attempting to compel plaintiff in error to pay the debt of Tourville to Flannigan, in Illinois, and the wages of Tourville to him, in Missouri, out of the one fund above described.

The length of time this triangular controversy has existed, is wholly immaterial, as, from any point of view, it cannot and ought not to be claimed that any laches can be imputed to the plaintiff in error, by reason of that situation.

*Conclusion.*

The amount involved in this controversy is not large, but the equitable principles at stake are of vital and public importance to the plaintiff in error, as well as to other employers of labor in many states who are in a similar situation.

The plaintiff in error, as this record discloses, owns and operates a line of railway extending through the states of Ohio, Michigan, Indiana, Illinois and Missouri.

It is a matter of common knowledge that it employs a large number of "all sorts and conditions of men."

This controversy was not of its seeking, but was forced upon it, by the manifest and declared intention of Tourville and his attorney, Rule, to compel it to pay the undisputed debt of Tourville to Flannigan, in Illinois, and the wages of Tourville, to himself, in Missouri, out of one and the same fund, or, in other words, to pay its debt to Tourville twice. (Tourville vs. Ry., 61 Mo. App. 531.)

Throughout this entire contest, both at law and in equity, the sole purpose of plaintiff in error has been, as it is now, to protect itself against the result above set forth. For that reason it endeavored unsuccessfully, at law, to interpose the Illinois suit as a defense to the Missouri proceeding and the Missouri suit as a defense to the Illinois proceeding.

As a last resort it attempted to bring the fund in dispute into a court of equity, there deposit it and let the chancellor determine which one of the rival claimants was entitled to it.

This could not have injured the defendant Rule, because, if, as he alleges, he is entitled to the fund by virtue of his priority, then he was sure to obtain it from the chancellor, and the same is equally true of Flannigan.

In lieu of that, although both claimants to the fund were in court, all relief was denied to plaintiff in error and its bill was dismissed for reasons, as we have shown, which cannot possibly commend themselves to a court of equity.

For, it is manifestly contrary to equity, as well to good conscience, to permit both Flannigan and Rule to collect their judgments out of one and the same fund from plaintiff in error, simply because such judgments were obtained in different states, and therefore "foreign to each other."

Courts of equity are organized to prevent the consummation of injustice like that, although such results are sometimes apparently unavoidable, in courts of law, even of last resort.

The equitable principle we are here contending for was, we think, expressly declared and enforced by this court and by the Supreme Court of Missouri, in the cases of

Ry. vs. Sturm, 174 U. S. 710;
Howland vs. Ry., 134 Mo. 474.

We therefore ask for a reversal of the judgment of the St. Louis Court of Appeals with directions to reinstate the bill of interpleader, to permit the plaintiff in error to deposit the fund in dispute in court; to be thence discharged with its costs; that the defendants, Flannigan and Rule, be required to interplead for said fund; and that their priorities thereto be determined.

Respectfully submitted,

WELLS H. BLODGETT,
GEORGE S. GROVER,
*Attorneys for Plaintiff in Error.*

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 115.

WABASH RAILROAD COMPANY,
*Plaintiff in Error,*
vs.
ALEXANDER FLANNIGAN AND VIRGIL RULE,
*Defendants in Error.*

IN ERROR TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

## STATEMENT, POINTS AND BRIEF FOR DEFENDANT IN ERROR VIRGIL RULE.

## STATEMENT.

Plaintiff in Error has devoted seven pages to a statement which is termed "A historical review of the undisputed facts." Many of the statements therein made are not true, but if they were true, they are not found in the Record in this case. A

just rebuke for trying to inject such a statement into this case is found in the opinion of the learned Judge of the St. Louis Court of Appeals, where he says (Rec. 38):

> "This history, while interesting as history, has no place in the Record beyond what is set forth in the bill for an interpleader, and what appears in the opinions of the appellate courts of this State to which the Tourville case was taken by successive appeals."

The pleadings, as far as they were made up, in this case consist of a Third Amended (substituted) Petition, a "Return" made under the Missouri Statute (Rec. 18) by Defendant Rule to a preliminary "Restraining Order, to show cause why a temporary injunction should not issue" (Rec. 17, erroneously designated "Temporary Injunction Granted"), and a "Motion for relief prayed for notwithstanding Return of Virgil Rule" (Rec. 21).

From these, and the opinions of the appellate courts to which the Tourville case was taken by successive appeals, it appears that on June 3rd, 1891, Defendant Flannigan instituted a garnishment proceeding against the Wabash Railroad Company, of Illinois, before a Justice at East St. Louis, to impound the wages of Peter Tourville. He obtained judgment in that proceeding, and said judgment was paid by the Wabash Company. (Wabash v. Tourville, 179 U. S. 32; Trans. Rec. No. 17350, U. S. Sup. Ct. 6.)

On June 10th, 1891, Tourville sued the Wabash Company of Missouri at St. Louis in Missouri, for his wages earned and payable only in that State, and obtained a judgment for $81.00 against said Com-

pany. Defendant Flannigan's Illinois judgment was pleaded in the Missouri court in bar to the Tourville judgment, but was not allowed (Tourville v. Wabash, 61 Mo. App. 527; Trans. Rec. No. 17350, U. S. Sup. Ct. 6).

The Tourville judgment was rendered on March 25th, 1895, by the St. Louis Court of Appeals. This was a final judgment and was never appealed. Thereafter Defendant Flannigan began a Second Garnishment Proceedings in Illinois, and on June 14th, 1895, obtained a second judgment for the same debt, before the same Court, against the Wabash Company, without opposition by that Company, notwithstanding the payment by said Company of the former judgment in the first garnishment proceedings (Rec. No. 17350, *supra*). This latter judgment obtained more than eight years ago Defendant Flannigan has made no effort to collect. Notwithstanding the Wabash Company of Illinois is solvent, no execution has been sued out on the judgment.

While Flannigan has made no effort to collect the judgment had in his Second Garnishment Proceedings, it was set up by the Wabash Company, as a defense, in bar, to the Tourville judgment in Missouri, and Tourville's rights under said judgment and its priority over the Flannigan judgment and the priorities and respective rights of all the parties to this Bill have been finally, fully and fairly adjudicated, at law, as shown in Defendants' bill of interpleader (Rec. 3–6), and by the opinions of the appellate courts to which the Tourville case was taken by successive appeals (Return of Defendant Rule, Rec. 18–20; Wabash v. Tourville, *supra*; Tourville v. Wabash, 128 Mo. 322; 61 Mo. App. 527).

After the Missouri courts, and this Court, had determined the validity and priority of the Tourville judgment as against the Flannigan judgment; after the Wabash had contested the validity and priority of these judgments in litigation covering ten years, which was finally settled in this Court (Wabash v. Tourville, *supra*), it was not satisfied with the judgment of this Court, and sought to have a *nisi prius* court in Missouri again adjudicate the priority of said judgments by this so-called bill of interpleader.

Defendant Rule is the assignee of the Tourville judgment. The bill asks that an injunction issue against Defendants Rule and Flannigan, restraining Rule from enforcing the collection of the Tourville judgment, and Flannigan from the collection of his judgment in the Second Garnishment Proceedings. Flannigan, though a resident and citizen of the State of Illinois, and out of the jurisdiction of the *nisi prius* court in Missouri, filed his voluntary appearance in the Missouri court, authorizing H. W. Blodgett, the son of the Vice-President and General Solicitor of the Wabash Company, to represent him in the attempted interpleader brought by that Company (Rec. 13, erroneously designated as voluntary appearance of Defendant Rule).

Upon the filing of the Third Amended (substituted) Petition April 15th, 1903, the Court issued an "**Order**" against Defendants Flannigan and Rule directing them to show cause on April 19th "why a temporary injunction should not be issued, and the relief prayed for in the Third Amended Petition should not be granted." Pending a hearing of said "**Order**" the Court issued a **Temporary Restraining Order** against both

of the Defendants (See Order Rec. 17, erroneously designated as "Temporary Injunction granted").

The sheriff served a copy of the "Order" on Defendant Rule, and at the time specified therein, Rule filed his "Return" under the Missouri Statute, to said Order (Rec. 18).

On April 22nd, 1901, the substituted plaintiff filed a motion which in effect admits the facts stated in the Return of Defendant Rule set forth on pages 18–20 of the Record. This motion is designated "Motion for relief prayed for notwithstanding Return of Virgil Rule" (Rec. 21).

Defendant Flannigan, being out of the jurisdiction of the Court, was not served with this Order (See Sheriff's Return Rec. 26), and he did not appear or make any return thereto, and the Court, upon the hearing at the time designated in the Order, took the matter under advisement, and, on **Monday, April 29th, 1901**, made a preliminary interlocutory finding on page 1 of the Record, from which the appeal herein was taken. The Order issued by the Court as to Defendant Flannigan was wholly without effect, as would have been any Order against him, he being out of the jurisdiction of the Court, and this fact was brought forcibly before the *nisi prius* court by reason of his having totally disregarded the order.

Four petitions were filed in the case. In the original, plaintiff was alleged to be a corporation organized under the laws of **Missouri and Illinois** (Rec. 25). In the three so-called amended petitions, plaintiff was alleged to be an **Ohio** corporation (Rec. 26). Defendant Rule was never served with any process issued at the instance of the Ohio corporate individual, and

he never appeared to any of the three so-called amended, in fact substituted petitions, except for the sole purpose of moving to strike them from the files. The Court sustained the motion to strike the first two from the files (Rec. 25–26), but the motion to strike the third from the files has never been passed upon because of the premature appeal (Rec. 26).

The only hearing was upon the preliminary "Restraining Order" issued April 15th and passed upon April 29th, 1901, commanding the defendants to show cause why a temporary injunction should not be granted against them. The prayer in the plaintiff's Bill, as to that Order was denied, and the Restraining Order granted against the defendants on April 15th was dissolved. (Rec. 1 and 27.)

Plaintiff did not prosecute its suit to a final determination, but appealed from the action of the Court on this preliminary Restraining Order, to the St. Louis Court of Appeals. That Court affirmed the action of the *nisi prius* court. After the judgment plaintiff made applications to the presiding Judge of the St. Louis Court of Appeals to have the case transferred, first, to the Supreme Court of Missouri, then to this court. These applications were denied because the questions sought to be raised in the bill were *res adjudicata*. (See opinion on denial of application Rec. 42.) Thereafter application was made to the Honorable David J. Brewer, Associate Justice of this court, and the writ was issued bringing the case here.

## POINTS.

I.

(*a*) The decision of the St. Louis Court of Appeals was upon the ground that all the parties to the bill of interpleader had had their day in court, and that the questions raised were *res adjudicata*. This is not a federal question and this court is, therefore, without jurisdiction.

Northern Pac. v. Ellis, 144 U. S. 464;
Hammond v. Johnson, 142 U. S. 73;
Hickman v. Fort Scott, 141 U. S. 415;
Chaffin v. Taylor, 116 U. S. 367;
Clark v. Keith, 106 U. S. 464;
Peck v. Sanderson, 18 How. 42.

(*b*) In order to give this Court power to revise the judgment of a State Court it must appear upon the transcript that the constitutional question was raised by the pleadings and decided against plaintiff in error.

Oxley v. Butler Co., 166 U. S. 657-8;
Hoydt v. Sheldon, 1 Black 518-21;
Maxwell v. Newbold, 18 How. 511.

(*c*) This Court will not review the judgment of a State court except upon the decree of the highest court in the State.

Rev. Stat. U. S., Sec. 709;
Farnsworth v. Montana, 129 U. S. 104;
Desty's Fed. Proc., Sec. 223.

(*d*) The Supreme Court of Missouri is the highest court in that State having jurisdiction in constitutional questions.

Constitution of Mo., Art. 6, Sec. 12;

State v. St. Louis Ct. of App., 97 Mo. 296–9;
State v. Caldwell, 57 Mo. App. 447;
*In re* Essex, 44 Mo. App. 289.

II.

**The bill of interpleader does not state facts sufficient to constitute a cause of action against defendants, for the following reasons:**

(*a*) It is essential to a bill of interpleader that the plaintiff shall make known his condition as a stakeholder by bringing a suit within a reasonable time after being advised of the double claims against him. It appears from the bill that plaintiff has been contesting this claim (now merged into the judgment of Defendant Rule) since June 10, 1891, with full knowledge of the claim of Defendant Flannigan.

Opinion, this Case, Rec. 39;
Cheever v. Hodgson, 9 Mo. App. 565;
Dodds v. Gregory, 61 Miss. 351;
McDevitt v. Sullivan, 8 Cal. 592;
Union Bank v. Kerr, 2 Md. Ch. 460;
Ency. P. & P., 462 k;
Barnes v. Bamberger, 196 Pa. St. 123;
Brackett v. Graves, 51 N. Y. S. Rep. 895.

(*b*) It is an essential to a bill of interpleader that the right of either defendant to the fund should not have been previously determined by a judgment at law against the plaintiff.

Cheever v. Hodgson, 9 Mo. App. 565;
McKinney v. Kuhn, 59 Miss. 186.
Ency. P. & P. 462;
Risher v. Roush 2 Mo. 95;
French v. Robrehard, 5 Vt. 43;
Holmes v. Clark, 46 Vt. 22;
Mitchell v. N. W. Mfg. Co., 26 Ill. App. 295;
Carroll v. Parks, 1 Baxt. 269;

Dodds v. Gregory, 61 Miss. 351;
Yarborough v. Thompson, B. S. & M. 291;
Haseltine v. Brickley, 16 Gratt. 116;
Cornish v. Tanner, 1 Young & J. 333;
Prov. Ins. Co. v. White, 115 Mass. 112; 103 Mass. 573.

(c) A bill of interpleader must show that the plaintiff is ignorant of the rights of the parties who are called upon to interplead.

Ency. P. & P. 465, n. 2;
Barker v. Barker, 42 N. H. 78;
Shaw v. Coster, 8 Paige 339;
Morgan v. Fillmore, 18 Abb. Pr. 219;
Mohawk, Etc., R. Co. v. Chute, 4 Paige 384;
Pfister v. Wade, 56 Cal. 43;
Illingworth v. Rowe, 52 N. J. Eq. 360;
Trigg v. Hitz, 17 Abb. Pr. 436;
Del., Etc., R. R. Co. v. Corwith, 16 Civ. Pro. Rch. (N. Y.) 312;
Heckmer v. Gilligan, 28 W. Va. 750.

(d) A judgment debt of one jurisdiction is not subject to a bill of interpleader in another jurisdiction.

Crane v. McDonald, 118 N. Y. 657;
Snodgrass v. Butler, 54 Miss. 45;
Fulton v. Chase, 6 N. Y. Supp. 126;
Gibson v. Goldwaite, 7 Ala. 281;
Stone v. Reed, 152 Mass. 179;
Boston, Etc., v. Skillings, 132 Mass. 418;
Fairbanks v. Bilknap, 135 Mass. 179;
Kyle v. Mary Lee Coal Co., 112 Ala. 606;
Morristown v. Binnings, 26 N. J. Eq. 345;
Bartlett v. Sutton, 23 F. R. 257.

III.

(a) The Circuit Court had no power to enforce its judgment against the person of Defendant Flannigan, hence a temporary injunction as against him would

have been wholly without effect, unless he chose to obey it.

R. S. Mo. 1899, Sec. 598, Point II, *d;*
Sheedy v. Second Nat'l Bank, 62 Mo. 17.

(*b*) The Missouri court would have no power to decree that the judgment of the Illinois court was void or that it was not void.

Carpenter v. Strange, 141 U. S. 88.

IV.

(*a*) A court of one jurisdiction cannot enjoin the collection of a judgment of another court of competent jurisdiction, in the absence of any allegation of fraud in obtaining such judgment.

Scrutchfield v. Souter, 119 Mo. 621;
Nelson v. Brown, 23 Mo. 13;
Keith v. Plemmons, 28 Mo. 104;
Pettus v. Elgin, 11 Mo. 411;
Mellier v. Bartlett, 89 Mo. 137.

(*b*) The various divisions of the Circuit Court of the City of St. Louis have a separate jurisdiction.

Haehl v. Wabash R. Co., 119 Mo. 325;
State *ex rel.* v. Eggers, 152 Mo. 487.

V.

(*a*) There is an indisputable legal presumption that a corporation is a citizen, or composed of citizens of the State which created it.

St. L. & S. F. R. Co. v. James, 161 U. S. 545;
St. Joseph R. Co. v. Steele, 167 U. S. 659;
Burrows Co. v. Cane, 170 U. S. 100;
New Albany R. Co. v. Louisville Co., 174 U. S. 552.

(*b*) The Wabash Railroad Company of Ohio, the substituted plaintiff in the amended petitions, being a citizen, or legal entity, owing its existence to the laws of the State of Ohio, is not the corporate individual which instituted this suit, and one individual cannot prosecute a suit instituted by another of the same name.

Tourville v. Wabash R. Co., 148 Mo. 614;
Nashau R. Co. v. Lowell R. Co., 136 U. S. 356;
Rev. Stat. Mo. 1899, Sec. 566;
Hall v. School Dist., 36 Mo. App. 23.

VI.

The temporary injunction was properly denied, because there was at the time, and is now, another suit pending between the same parties for the same purpose in another court in the State of Missouri.

R. S. Mo. 1899, Sec. 598.

VII.

Under the Missouri law no appeal lies from an order of Court dissolving a temporary injunction (*a*), or refusing to grant an injunction (*b*), or refusing to appoint a receiver (*c*), or from an order overruling or sustaining a demurrer (*d*), or from any order or decision not specified in the statute regulating the taking of appeals (*e*). The right to an appeal is purely statutory; there is no vested right therein (*f*).

(*a*) Richards v. Johnson, 34 Mo. App. 83;
(*b*) Harrison v. Rush, 15 Mo. 175;
(*c*) State *ex rel.* v. Hirzel, 137 Mo. 445–6;
St. Louis, Etc. R. Co. v. Wear, 135 Mo. 230;
(*d*) Palmer v. Crane, 8 Mo. 619;
Robinson v. County Ct., 32 Mo. 428;
Berry v. Zimmerman, 43 Mo. 215;

Spears v. Bond, 79 Mo. 467;
(*e*) Voorhis v. Western Union, 59 Mo. App. 55;
Russell v. St. Louis, Etc. R. Co., 154 Mo. 431;
(*f*) State *ex rel.* v. Woodson, 128 Mo. 497;
Schuster v. Weiss, 114 Mo. 158;
*In re* Bauer, 112 Mo. 231.

## ARGUMENT.

I.

There is no constitutional question in this case. But if there was, in order to give this Court power to revise the judgment of the State Court, on that ground, it must appear upon the transcript that the point was raised in the State Court and **decided against Plaintiff in Error.** (Oxley v. Butler Co., 166 U. S. 657–8, and cases cited.)

It is true in this case, as in the Oxley case: "All the matters put in issue by the bill and answer, and decided by the State Court, were questions which depended for their decision upon principles of law and equity as recognized and administered in the State of Missouri, and without reference to the construction of any provision in the Constitution." In the motion for a rehearing in the *nisi prius* court, and upon the application made to the St. Louis Court of Appeals to transfer to the Supreme Court, it was stated by appellant that there was a constitutional question involved. That point was not raised until **after judgment,** and the Court of Appeals having decided the case upon a ground broad enough to maintain the judgment without considering the so-called constitutional question, refused to consider it, **first,** because such question upon the face of the Bill was

*res adjudicata*, and, **second**, because not "specially set up and claimed until after judgment."

The application made to the presiding Judge of that Court for a Writ of Error to this Court, was denied in the following opinion:

> **"In Wabash v. Tourville, 179 U. S. 322, the judgment herein involved came under review. The validity of the Tourville judgment, as we understand the opinion, was sustained and its priority over that of Flannigan was adjudged. In the face of this decision we deny the writ."** (Rec. 42.)

And the opinion of that Court concluded with the following:

> **"Appellant (Plaintiff in Error here) has had its day and opportunity in court to make its defense to both the claims. It defended the Tourville suit, but, for aught that appears in the bill of interpleader and in the pleadings, the defense it might have successfully made as garnishee in the Flannigan suit it did not make and it is too late now to require Rule, the assignee of Tourville, to come into a court of equity and interplead for a debt that has been reduced to a final judgment and to show his superior claim by showing priority of suit and priority of judgment over the Flannigan judgment, which the appellant might have done as garnishee as a bar to that suit. It may be that under the ruling of Allen v. Watt, 79 Ill. 284, the appellant, after paying the Tourville judgment, may successfully enjoin the collection of the Flannigan judgment in the courts of Illinois, but we are clearly of the opinion that it is not entitled to the relief prayed for."** (Rec. 40.)

It is thus clear that the decision of the St. Louis Court of Appeals is upon a ground not involving any federal question, and that ground is broad enough to maintain the judgment. Such being the case this Court is without jurisdiction, and the St. Louis Court of Appeals was right in denying the Writ of Error. **Northern Pacific v. Ellis, 144 U. S. 464, and cases there cited.**

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**This Court is without jurisdiction to hear and determine this controversy, because the St. Louis Court of Appeals is not the highest court in that State.**

The case is brought here under authority of Rev. Stats. U. S. Sec. 709, and under that statute this Court will not review the judgment of a State court, **except upon the decree of the highest court in the State. Farnsworth v. Montana, 129 U. S. 104.** The Constitution of the State of Missouri fixing the jurisdiction of the St. Louis Court of Appeals, from which court this suit was brought here, provides:

> "Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases **only:** * * * **In cases involving the construction of the Constitution of the United States or of this State.**" (Const. Mo. Art. 6, Sec. 12.)

The Missouri Courts in construing that section of the Constitution have universally held that the Supreme Court of Missouri is the highest and only court in that State having jurisdiction over Constitutional questions, and when the Point is raised in the St. Louis Court of Appeals before judgment, that court must transfer the case to the Supreme Court (cases Point I) **even though the raising of the question is a mere sham.** *In re* **Essex, 44 Mo. App. 288.**

II.

**The Third Substituted Petition does not state facts sufficient to constitute a cause of action for the final equitable relief therein prayed for, for the following reasons:**

There is no principle better settled than that a litigant cannot fight his case in a court of law and when

defeated there ask relief of a court of equity—except upon **fraud or mistake.** Plaintiff admits (Brief 22) "it endeavored unsuccessfully, at law, to interpose the Illinois suit as a defense to the Missouri proceeding" and now asks the same relief in a court of equity, and we suppose will again want to return to a law court when defeated in equity.

(*a*) It appears on the face of the bill that plaintiff has been contesting the right of Tourville to obtain the judgment at Law (the collection of which is now sought to be enjoined) since June 10th, 1891. It is essential to a bill of interpleader that the plaintiff shall make known his condition as a stakeholder by bringing suit within a reasonable time after being advised of the double claim against the fund. (Point II, *a.*)

(*b*) It is partly upon the foregoing principle that, in a bill of interpleader, the right of either defendant to the fund should not have been previously determined by a judgment at law against the plaintiff. (Point II, *b.*)

The principle is pertinently stated in a recent case as follows:

> "It is well settled both by reason and authority that one who asks the interposition of a court of equity to compel others claiming property in his hands, to interplead, **must do so before putting them to the test of trials at law.** The remedy by interpleader is to afford protection to a party from the annoyance and hazard of two or more actions touching the same property or demand; but one who with knowledge of all the facts, neglects to avail himself of the relief, or elects to take the chances for success in the actions at law, ought to submit to the consequences of defeat. **To per-**

**mit an unsuccessful defendant to compel the successful plaintiffs to interplead, is to increase instead of diminish the number of suits; to put upon the shoulders of others the burden which he asks may be taken from his own."** McKinney v. Kuhn, 59 Miss. 186.

It appears upon the face of the Third Amended Petition that plaintiff, being cognizant of both the claims of Flannigan and Tourville, submitted its case to a court of law, and it is a well settled principle of equitable jurisprudence that if a party has submitted his case to a court of law, and the court had jurisdiction to adjudicate thereon, he is by such adjudication precluded from any relief in equity. **Risher v. Roush, 2 Mo. 95.**

Our Missouri Court has stated the rule in the following language:

> "A bill of interpleader is the appropriate remedy where different claimants threaten, or have begun suits, and the one in possession of the fund, disclaiming any right to retain it and admitting that it belongs to one or other of the claimants, but not knowing to which it ought to be paid, asks the intervention of a court, that he may not run the risk of paying twice. But the theory is that the rights of the claimants are not not known; **after those rights have been passed upon, and there is a judgment as to those rights, it does not appear how a court of equity can interfere on the footing of a bill of interpleader. The complainant should have filed his bill before judgment." Cheever v. Hodgson, 9 Mo. App. 568.**

(*c*) A bill of interpleader must show that plaintiff is ignorant of the rights of the parties who are called upon to interplead, while the Third Substituted Petition shows plaintiff to have been entirely cognizant of the rights of defendants. In the language of a recent writer, "being thus of the requisite knowledge

it devolved upon himself to determine to which of the claimants he would pay." The office of the bill of interpleader is not to protect any party against double liability, but against double vexation in respect to one liability. Enc. P. & P. 459 *g*.

(*d*) Also, the debt of Flannigan is a judgment debt of the jurisdiction of Illinois, and it is a well settled principle of equitable jurisprudence that a judgment debt in one jurisdiction is not subject to a bill of interpleader in another jurisdiction. (Point II, *d*.)

The reason upon which this rule is founded is because the cause of action "loses its vitality;" it is no longer a mere claim or lien, it is a final judgment not subject to be impounded as a debt in another court. This Court in the former adjudication of this same case, in speaking of the judgment of the Missouri Court, states the rule thus:

> "One of the effects of that judgment was to merge the cause of action, the debt sued for into the judgment, 'it was drowned in the judgment.' It thereby 'lost its vitality' aud 'all its power to sustain rights and enforce liabilities terminated in the judgment.' **On March 26, 1895, the old debt of the company to the plaintiff ceased to exist,** and thereafter could not sustain any liability imposed thereon by the subsequent garnishment proceedings."
>
> Wabash v. Tourville, 179 U. S. 326.

The Tourville debt "lost its vitality" in his judgment. That judgment a final one now belongs to Rule. It cannot be brought into court now, after twelve years of litigation, after it has ripened into a judgment, and be made the subject of interpleader. It is not any longer the debt due Tourville. It is no

longer a fund in plaintiff's hands, it is a judgment, and "all its power to sustain rights terminated when it became a judgment."

III.

The Circuit Court had no jurisdiction over Defendant Flannigan, and could not enforce its decree against him. It appears from the Third Substituted Petition that Flannigan is a resident and citizen of the State of Illinois. If the Missouri Court should have granted an injunction and he should have violated it that Court would be wholly without power to send into Illinois and bring him into its jurisdiction for the purpose of punishing him for contempt. This fact was brought forcibly before the Missouri *nisi prius* court, by reason of the fact, that the sheriff could not serve Flannigan with the "Order to Show Cause," of April 15th, 1901, and of Flannigan wholly disregarding the Order, and failing to make any Return, thereto. One of the grounds for a demurrer under the Missouri Statute, is, that the Court has no jurisdiction over the person of a defendant. **R. S. Mo. 1899, Sec. 598.** It is partly upon this principle that a judgment debt of one jurisdiction is not subject to interpleader in another jurisdiction (Point II, *d*). A non-resident cannot be compelled to interplead (**Sheedy v. Second Nat'l Bank, 62 Mo. 17**), and the Missouri Court would have no power to decree that the judgment of the Illinois Court was void or not void. Carpenter v. Strange, 141 U. S. 87.

IV.

It appeared from the third substituted petition that it was an attempt to have one *nisi prius* court en-

join the collection of a judgment of another *nisi prius* court of competent jurisdiction. In the case of **State *ex rel.* v. Eggers, 152 Mo. 487,** and in **Haehl v. Wabash, 119 Mo. 325,** it was **held,** that the different divisions of the Circuit Court of the City of St. Louis **were courts of separate jurisdiction,** and that one division had no more jurisdiction over a case in another division, than the Circuit Court of an adjoining county would have. The language of the Supreme Court was as follows:

> "When a case is regularly assigned to a particular division, that division, for the purpose of that case, is as exclusive in its jurisdiction as if it were the whole court, or as if the court was a unit; **another division** * * * has no more **jurisdiction over that case than the Circuit Court of an adjoining county."**

The execution which the substituted plaintiff seeks to have enjoined, in so far as Rule is concerned, is an execution upon a judgment of Division No. 3 of the Circuit Court, City of St. Louis, to-wit: the judgment in the case of Tourville v. Wabash, Case No. 85743, Div. No. 3, set out in said petition. That judgment has the sanction of said Court, of the St. Louis Court of Appeals, of the Supreme Court of Missouri, and the Supreme Court of the United States. (Tourville v. Wabash, 179 U. S. 322; s. c. 148 Mo. 614; s. c. 61 Mo. App. 527.) **It is not claimed that the judgment in that case was fraudulently obtained.** What a travesty upon justice it would have been for the *nisi prius* court to have assumed the power to enjoin the collection of **such a judgment** in another *nisi prius* court, over the process of which it had no control, and where it is not claimed the judgment was fraudulently obtained.

In **Scrutchfield v. Souter, 119 Mo. 621,** the Supreme Court of Missouri held that the Court from which the exe-

cution was issued, under the general law and statute, **has the exclusive right to control it and no other Court has a right to interfere.**

The same rule has been expressed in another case, as follows:

> "The general rule undoubtedly is that every court has the exclusive control of its process, and no other court has a right to interfere with or control it. Hence, an injunction cannot be issued from another court." Mellier v. Bartlett, *supra*.

V.

This defendant has not entered his voluntary appearance to any proceeding brought by the Wabash Company of **Ohio**, has not been summoned or brought into court upon any process sued out by that corporation, and has not waived the suing out of such process.

The manner of instituting suits in Missouri is found in R. S. 1899, Sec. 566:

> "It is, **first**, by filing in the office of the clerk of the proper court, a petition setting forth plaintiff's cause of action, and the remedy sought, and by the voluntary appearance of the adverse party thereto; or, **second**, by filing such petition in such office, and suing out thereon a writ of summons against the person or of attachment against the property of the defendant."

In this case the Wabash Company of **Ohio**, has not complied with the above statute. There is no provision of law for substituting John Smith of Ohio, as a party plaintiff in the place and stead of John Smith of Missouri; nor is there any provision for the substitution of an Ohio corporation as a party plaintiff

in the place and stead of a Missouri corporation by the same name.

The plaintiff in the original petition filed in this case alleged that it was "a corporation duly organized under the laws of Missouri and Illinois." (Rec. 11.) The plaintiff in the First and Second Substituted Petitions was a corporation "duly organized under the laws of the State of Ohio." (Rec. 14.) The plaintiff in the Third Substituted Petition was a corporation "first organized as such in the State of **Ohio**, and subsequently organized as such in the States of Illinois and Missouri, and duly organized as a consolidated corporation under the laws of the States of Ohio, Illinois and Missouri." (Rec. 3).

The Supreme Court of the United States in St. L. & S. F. R. Co. v. James, 161 U. S. 545 (followed in cases Point I, *b*), **held**, that there is an **indisputable legal presumption that a State corporation**, when sued or suing in a Circuit Court of the United States **is composed of citizens of the State which created it.**

If there an "indisputable legal presumption" that the corporation that instituted this suit is composed of citizens of Missouri, and that the corporation that filed the Third Substituted Petition is composed of citizens of Ohio, as above stated, then here there is a substitution of a different party plaintiff, without due process of law, against this defendant, for this defendant has not entered his voluntary appearance thereto, and has not been served by any Process sued out by the Ohio corporation, the plaintiff in the Third Substituded Petition.

In the litigation, of which this suit is a part, it was agreed that the Wabash Railroad Company was "a

consolidated corporation **separately** organized under the laws of Michigan, Ohio, Indiana, Illinois and Missouri;" and in an opinion by the Supreme Court of Missouri, which has since been approved by this Court, in construing the legal status of the various corporations organized under the laws of said States by the name of Wabash Railroad Company, said:

> "The defendant in this case has a separate and independent corporate existence both in this State and in the State of Illinois. 'Railroad corporations created by two or more States, though joined in their interests in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity, but each has its existence and its standing in the courts of the country only by virtue of the legislation by which it was created, and the union of name, of officers, of business, and of property does not change their distinctive character as separate corporations.' **Nashau R. Co. v. Lowell R. Co., 136 U. S. 356.** So that in the defendant we have two legal entities, one a corporation and citizen of Illinois, the other a corporation and citizen of Missouri. With the former the plaintiff had no dealings and it owed him nothing. The latter became indebted to him in the sum of $81 for wages earned in Missouri, and under the laws thereof exempt from attachment, execution and garnishment; and while it may be difficult to see how this debt due the plaintiff from the Wabash Railroad Company of Missouri could be impounded in the courts of Illinois by the service of garnishment process on the Wabash Railroad Company of Illinois, the ruling of the Court of Appeals was not based upon the ground that it was not so subject." Tourville v. Wabash, 148 Mo. 614; s. c. 179 U. S. 323.

So we say that in the attempted substitution of a party plaintiff other than the one named in the orig-

inal petition there has been a departure as to the party plaintiff, and the Ohio corporation was not properly before the Circuit Court, and that court was wholly without jurisdiction, because no process of law has been issued against this defendant at the instance of the Ohio corporation.

VI.

Referring to the second paragraph of the Return of Defendant Rule to the Order of April 15th, 1901 (Rec. 18), plaintiff cannot maintain his prayer for a temporary injunction in this case, because in Case No. 68 to the June Term, 1901, of the St. Louis Circuit Court, City of St. Louis, under the style of "Wabash Railroad Company v. Virgil Rule, assignee of Peter Tourville," the purpose of the bill is to enjoin and restrain said Rule from the collection of his judgment until the termination of this suit. That a party cannot maintain his suit when there is another action pending between the same parties for the same cause of action in another court of the State of Missouri, is a statutory ground for demurrer to the bill. R. S. Mo. 1899, Sec. 598.

VII.

The appeal in this case was prematurely taken. The record of April 29th, 1901, that is, **the judgment appealed from,** is the

> **"Order of April 15th, 1901, commanding the defendants to show cause why a temporary injunction should not be granted against them, coming on for hearing upon the pleadings, affidavits and proofs adduced, and the Court having duly considered the same, and now being sufficiently advised of and concerning the premises, doth order that the prayer of plaintiff's bill be and is denied. It is further ordered**

**by the Court that the restraining order granted against defendants on April 15th, 1901, be and is hereby dissolved."** (Rec. 1.)

The substituted plaintiff's Third Petition was not dismissed by the foregoing finding, and defendant Rule's motion to strike out the Third Amended Petition has not been passed upon. The only question that came on for hearing on April 29th, 1901, and the only question that was considered by the Court "upon the pleadings, affidavits and proofs adduced," was, as shown by the record entry of that day, the preliminary **order of April 15th, 1901, commanding the defendants to show cause why a temporary injunction should not be granted against them."** The prayer of plaintiff's bill which was, in fact, denied, and according to the record, was that embraced in the order to show cause, etc.

The substituted plaintiff, on April 30th, 1901, the next day after the Court had passed upon the "order of April 15th, 1901," filed a motion, which motion was designated on the back "Motion for Rehearing," but according to the language of the motion, was a motion (Rec. 23) **"to set aside the order of April 29th, 1901,** and grant it a rehearing in said cause," which motion was by the Court overruled, and from the action of the Court in overruling that motion, that is the motion to set aside the order of April 29th, an appeal was taken to this Court.

The Missouri statute allows an appeal from an order "dissolving an injunction," but just as in the case of a receiver not from an order **refusing to grant a temporary injunction and dissolving a mere restraining order** made pending the hearing of an order to "show cause why a temporary injunction should not issue." The right to an appeal is not a vested right, it is purely statu-

tory. (Point VI, *g*.) The return of Defendant Rule is in part in the nature of a demurrer, but no appeal lies from an order, sustaining a demurrer until after a final judgment of dismissal (Point VI, *c*).

On April 29th, Defendant Rule, appearing for the purposes of the motion only, filed a motion to strike out or dismiss the Third Amended Petition, and that motion is still pending and undisposed of, because of the premature appeal (Rec. 26). The plaintiff is not out of court and out to stay, as insisted in its brief. The right to have the defendants interplead was not determined by the order of **April 29th, 1901.**

## IN CONCLUSION.

In 1891, Peter Tourville worked for the Wabash Railroad Company of Missouri, Flannigan sought to impound his wages (which were exempt from execution under the laws of Missouri) by garnishment proceedings in Illinois against a corporation of that State, united in its interests with the corporation of Missouri. Said wages being exempt in Missouri were also exempt under the laws of Illinois then in force (2 Starr, and C., Ills. Stat. Ch. 52, Sec. 22).

More than twelve years ago plaintiff became possessed of knowledge of the respective claims of Flannigan and Tourville to what was then a fund in its hands as a mere stakeholder, but which has since become a judgment debt, now owned by Virgil Rule, this defendant. It then and there devolved upon plaintiff to determine which of the claimants it would pay, or else then and there bring its bill of interpleader asking to have its rival claimants interplead for the fund.

The Justice of the Peace, attorney for the Missouri

company, "the only company that was ever indebted to Tourville," chose to pay the Illinois claimant and fight the Missouri claimant, instead of bringing a bill of interpleader. Said attorney decided upon the course his company would pursue, and every court in the country, from James McCaffrey, Justice of the Peace, to the highest tribunal in the land, has said he was wrong. In 1895 Flannigan, to whom the $81.00 that had been in controversy had been once paid under execution, was permitted to obtain another judgment for the same fund, in the same court, without opposition upon that ground. He has had that judgment for over eight years, in Illinois, against a perfectly solvent Illinois company and made no attempt to collect it. It was an absolute and undisputed defense to obtaining that judgment, that the same fund had been once before impounded in that court and paid under execution issued out of that court. It was an absolute defense to that case that Tourville had a prior judgment in Missouri and the debt had changed from being a fund to a judgment. But said attorney was bent on defeating the prior Tourville judgment, and needed a judgment, as he supposed, against the Wabosh, with which to defeat the judgment of Tourville. Aided by the Wabash, in not interposing these defenses, Flannigan obtained a second judgment for the same debt, but never has had an execution issued thereon. The Missouri company has interposed that judgment as a defense, on a motion to quash the execution issued on the judgment in Missouri, and this Court and the Missouri Courts have decided against it. It is alleged that Flannigan is now trying to enforce his judgment, and he appoints the son of the General

Solicitor and Vice-President of the Wabash Company (whose name is signed to its brief in this court) his true and lawful attorney (Rec. 13 erroneously designated as "voluntary appearance of Defendant Rule") to represent him in a court of equity in an attempt to again prevent the collection of the Tourville judgment, now owned by this defendant. Flannigan cannot be compelled to interplead in the State of Missouri, but he comes into that State, at least very closely allied with plaintiff, and, admitting all the facts of plaintiff's bill wants a court of equity to award him another judgment. Would a judgment in Missouri be any better than the one he obtained in Illinois, in 1895? The plaintiff says Flannigan has a valid judgment against it in Illinois; if the allegation be true, he could have collected it eight years ago. We say therefore that upon the face of the bill, it is not intended to be an interpleader, because the priorities of the two judgments have already been adjudicated, at law, and the court where the bill is brought could not enforce its decree against Flannigan. The only purpose of the so-called interpleader is an attempt to obtain an injunction against Rule. The bill is a sham upon its face. There is no disputed principle sought to be settled by bringing this Eighty Dollar suit a second time to this court. There is no equity in the bill, there is no federal question involved, this Court is without jurisdiction. The writ of error should therefore be dismissed and the judgment affirmed.

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